APPENDIX A

[*United States District Court, Northern District of Oklahoma*]

MEMORANDUM

The Court has for decision here the question of whether sanctions for civil contempt can be imposed against the plaintiff, Hyde Construction Co., and its attorney Vardaman S. Dunn.

Obtaining jurisdiction by attachment, plaintiff instituted this action in a United States District Court in Mississippi to recover a money judgment for breach of contract and for a declaratory judgment and injunction. The case has been transferred to this Court.

Plaintiff then brought suit in a Mississippi state court against the same defendant on the same cause of action and obtained jurisdiction by attachment.

Dalrymple Equipment Company was the resident attachment defendant in both actions.

A temporary restraining order was issued in this case restraining the parties from proceeding in the state court action. Hyde and its attorneys had notice of it. It and they proceeded with the state court trial over a period of some fifteen days and concluded the trial on March 26, 1964. During that period of time the restraining order was in force, and this Court had issued and served on Hyde and its attorneys an order to show cause why they should not be found in contempt.

On March 14th, the Court entered its findings that Hyde and its attorneys, Vardaman S. Dunn and Charles Clark, were in contempt, and took under advisement the matter of imposing sanctions. On April 9, 1964, Charles Clark was purged of civil contempt.

On March 27, 1964, this Court denied Koehring's application for preliminary injunction and the temporary restraining order as extended, expired by lapse of time.

A hearing has been held concerning the sanctions, if any, to be imposed for the civil contempt.

Hyde urges that upon denial of the application for a preliminary injunction all matters relating to civil contempt were terminated. Salvage Process Co. v. Acme Tank Cleaning Corp., 1936, 2 Cir. 86 F. 2d 727; Worden v. Searls, 1886, 121 U. S. 14, 30 L. Ed. 853; U. S. v. United Mine Workers, 1946, 330 U. S. 258, 294-5, 91 L. Ed. 884, 913.

In the last cited case, the Court's remarks as to obligation for compliance (p. 294) indicate that expiration of an order is not equivalent to reversal; the temporary restraining order and preliminary injunction there involved were sustained, not reversed and the language at pp. 294-5 as to the effect of reversal appears to be obiter dicta. In the other cases cited, the "basic action" was for injunctive relief, the preliminary injunction awarded some of that relief, and plaintiff lost its case on the merits. The contempt order thus was reversed upon and as a part of the adjudication in the basic action that plaintiff had no rights which were violated. See 121 U. S. at p. 25 and 86 F. 2d 725.

In the case at bar the temporary restraining order does not touch the merits. It was wholly ancillary and was designed to halt prosecution of the state court action at least until further inquiry could be made. It has not been set aside or reversed. The order denying the preliminary injunction did not affect it nor constitute a determination that it was improvidently entered. On the contrary, the findings and conclusions are that it was properly entered.

A major reason for denial of the temporary injunction was that the acts sought to be enjoined had already been committed. The authorities cited do not sustain the contention made. Compare Brougham v. Oceanic Steam Navigation Co., 1913, 2 Cir., 205 F. 857; Land v. Dollar, 1951, D.C. Cir., 190 F. 2d 366, cert. dismissed 344 U. S. 806, 97 L. Ed. 628; Blackwelder v. Crooks, D. C., D. C. 1957, 151 F. Supp. 26, 28, affirmed in part and reversed in part, 252 F. 2d 854; Cummings-Landau Machinery Co. v. Koplin, Ill. 1944, 54 N. E. 2d 462. These cases may not be precisely in point. Indeed, it may be that here is a case of first impression.

The verified petition for order to show cause and the order to show cause are a sufficient basis for this proceeding. The parties charged have filed no answer or other pleading denying nor have they otherwise denied violation of the temporary restraining order. The proof of violation is complete and sufficient. There is no fatal defect in the procedural aspects of the case. U. S. v. United Mine Workers of America, supra, 330 U.S. 258, 295-8, 91 L. Ed. 884, 914-15; National Labor Relations Board v. Tupelo Garment Co., 1941, 5 Cir., 122 F. 2d 603.

The respondents have elected to test the order by disobeying it. The law is clear as to the consequences of that course of action. The Court may impose sanctions to deprive the contemnors of the fruits of their contemptuous conduct, to restore the status quo as nearly as may be, to coerce obedience and to compensate the opposite party for loss caused by disobedience. "The measure of the court's power * * * is determined by the requirements of full remedial relief." McComb v. Jacksonville Paper Co., 1949, 336 U. S. 187, 193, 93 L. Ed. 599, 605. And see: Deeds v. Gilmer, 1934, Va., 174 S. E. 37; Keys v. Alligood, 1919, N. C., 100 S. E., 113; Parker v. U. S.,

1946, 1st Cir., 153 F. 2d, 66; U. S. v. Onan, 1951, 8 Cir., 190 F. 2d 1; Leman v. Krentler-Arnold Hinge Last Co., 1931, 284 U. S. 448, 76 L. Ed. 389; Toledo Scale Co. v. Computing Scale Co., 1923, 261 U. S. 399, 67 L. Ed. 719.

It is made to appear to this court that a Mississippi state court has enjoined Koehring Company from proceeding to trial of this case in this Court. Aside from evidence thereof, this and other Federal Courts may take judicial notice of such a proceeding. Wagner v. Fawcett Publications, 1962, 7 Cir., 307 F. 2nd 409. No decision concerning that injunction is here made, but Donovan v. Dallas, decided June 8, 1964, 377 U. S. 408, 12 L. Ed. 2d (Adv. Sheets) 409 is of interest. The conflict between courts has been brought about by events originating in respondents disobedience of the temporary restraining order of this court. It is hoped that there may be an orderly resolution of that conflict.

An order will be entered in accordance with the views expressed in this memorandum.

Allen E. Barrow
U. S. District Judge
Northern District of Oklahoma

Filed Sept. 1, 1964

JUDGMENT AND ORDER

On the 18th day of June, 1964, this cause came on for further hearing in the civil contempt proceeding against Hyde Construction Company, Inc., and Vardaman S. Dunn. Further evidence was heard. There were arguments by counsel and time was given for the filing of briefs pending which the matter was taken under advisement.

At this and previous hearings it is made to appear to the Court that in violation of the temporary restraining

order of this Court, Hyde Construction Company, Inc. and its attorney, Vardaman S. Dunn proceeded with and concluded the trial of Cause No. 60068 in the Chancery Court for the First Judicial District of Hinds County, Mississippi, and continuing therewith to the rendition of a judgment therein on April 8, 1964 in favor of Hyde and against Koehring.

Now on this 1st day of September, 1964, It Is Ordered, Adjudged And Decreed by the Court

1. The trial of this case in this Court shall be had and conducted as if said Cause No. 60,068 in the Chancery Court for the First Judicial District of Hinds County, Mississippi had not been tried and as if the judgment therein had not been rendered. Nevertheless, this Court may at any time consider the judgment in said Case No. 60,068 in making final disposition of the matters hereinafter set out and in rendition of its judgment herein.

2. Until the further order of this Court, the plaintiff, Hyde Construction Company, Inc., its officers, agents, servants, employees, assigns, attorneys, and/or any person or corporation acting in concert therewith, be and they hereby are enjoined and restrained from directly or indirectly enforcing or collecting or attempting to enforce or collect in any manner whatsoever any rights or claims under or by virtue of the decree entered under date of April 8, 1964, in said Cause No. 60,068, or any other decree, judgment, motion, action, process, execution, proceeding or order premised thereupon; but nevertheless the ones so restrained may participate in and contest any appeal from said judgment taken by Koehring Company.

3. Subsequent to the issuance of the temporary restraining order herein, Koehring Company has incurred

reasonable and necessary expense of $28,866.33 because of the acts of Hyde Construction Company, Inc. and Vardaman S. Dunn in violation of the temporary restraining order. Of this, $9,009.80 is the reasonable and necessary expense in connection with the institution and prosecution of the proceedings in this court concerning contempt, and $19,856.53 is the reasonable and necessary expense in connection with proceedings had in Mississippi arising out of the violation of this Court's temporary restraining order. It Is Therefore Ordered And Decreed by the Court that Hyde Construction Company, Inc. and Vardaman S. Dunn shall be jointly and severally liable for and shall pay to Koehring Company forthwith the said sum of $9,009.80. Whether or not they or either of them shall be required to pay any further sum or sums is reserved for decision until the trial of this case has been concluded in this Court or until the further order of this Court granted for any reason.

4. It Is Therefore Ordered And Decreed By The Court that judgment is hereby entered in the sum of $9,009.80 against Hyde Construction Company and Vardaman S. Dunn, jointly and severally, and in favor of Koehring Company to reimburse Koehring Company for expenses incurred in connection with the institution and prosecution of the civil contempt proceedings as hereinabove set forth.

5. Jurisdiction of this cause and of this proceeding is retained for all purposes, including the purpose of giving full effect to this order and the making of such further orders and decrees or taking such further action as may be necessary or appropriate.

Allen E. Barrow
United States District Judge

Filed Sept. 1, 1964

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

HYDE CONSTRUCTION COMPANY, INC.,
Plaintiff,

vs.

KOEHRING COMPANY, and C. S. JOHNSON COMPANY, et al,
Defendant.

Civil Action No. 5911

FINDINGS OF FACT AND CONCLUSIONS OF LAW

An amended and Supplemental Motion to Dissolve Injunction and Vacate Order of Civil Contempt and to Dismiss Cause, having been heard before the Court on April 8, 1966, all of the parties appearing by counsel, and the briefs having been read and arguments of counsel having been heard and the Court having been fully advised in the premises, it is hereby decided and found as follows:

FINDINGS OF FACT

1. On September 1, 1964, this Court in a civil contempt proceeding issued an order providing among other things that the above captioned case be tried in this Court as if Cause No. 60,068 in the Chancery Court for the First Judicial District of Hinds County, Mississippi, had not been tried and as if the judgment therein had not been rendered.

2. This order was appealed to the U. S. Court of Appeals for the 10th Circuit by Plaintiff. The Court of Appeals in part reversed this Court's ruling.

3. Defendant filed a petition for certiorari to the U. S. Supreme Court. The U. S. Supreme Court granted certiorari, reversed the ruling of the Court of Appeals and remanded the action to this Court.

4. Plaintiff petitioned the U. S. Supreme Court for a rehearing, alleging that the case should instead be remanded to the U. S. Court of Appeals for the 10th Circuit. This petition for rehearing was denied and the case was remanded to this Court.

CONCLUSION OF LAW

To grant this motion would frustrate the September 1, 1964 order of this Court as affirmed by the U. S. Supreme Court and, therefore, the motion is overruled.

Dated this 24th day of April, 1966.

Allen E. Barrow
United States District Judge

[SEAL]

APPENDIX B (Cont'd)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ORDER

On April 8, 1966, the following four motions of Plaintiff came on for hearing: (1) Amended and Supplemental Motion to Dissolve Injunction and Vacate Order of Civil Contempt and to Dismiss Cause; (2) Amended and Supplemental Motion to Transfer Back; (3) Motion in Reference to Defendant's Notice to Take Depositions; and (4) Motion for Leave to File An Amended and Supplemental Answer to Defendant's Counterclaim and Amended Counterclaim. The Court, having studied the briefs and heard oral argument,

ORDERS that Plaintiff's Motions (1), (2), and (3) be, and are overruled;

ORDERS that Plaintiff's Motion (4) be, and is granted and Defendant is granted leave, within 10 days after the filing of Plaintiff's Amended and Supplemental Answer, to move to strike the same; and

FURTHER ORDERS that Defendant's attorneys prepare Findings of Fact and Conclusions of Law in accordance with the views expressed by the Court.

DATED, this 18th day of April, 1966.

s/ Allen E. Barrow
United States District Judge

(SEAL)

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 8717 — JANUARY TERM, 1968

HYDE CONSTRUCTION COMPANY, INC., Appellant, v. KOEHRING COMPANY, Appellee.	Appeal from the United States District Court for the Northern District of Oklahoma

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Before BREITENSTEIN, HILL and SETH, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This bitterly contested litigation has cut a tortuous path through federal and state courts since its inception in 1961. It is now before us on an appeal from a denial by the United States District Court for the Northern District of Oklahoma of a motion by appellant Hyde Construction Company to dissolve an injunction which, among other things, restrains Hyde from enforcing a judgment obtained in a Mississippi state court and sustained by the Supreme Court of that state. The judgment awarded Hyde damages for breach of contract by appellee Koehring Company. Consideration of the issues requires an understanding of the appalling background.

Hyde was the prime contractor for the construction of a spillway at the federal Keystone Dam project in Oklahoma. Hyde contracted with Koehring for the design and installation by Koehring of a concrete cooling and mixing plant for use by Hyde on the project. Difficulties arose in the performance of the contract. On August 30, 1961, Hyde sued Koehring in the United States District Court for the Southern District of Mississippi to recover damages for the breach of the concrete plant contract. Jurisdiction was based on diversity. On the next day, Koehring sued Hyde in the United States District Court for the Northern District of Oklahoma to recover the unpaid balance of the cost of the plant. This was paid and the Oklahoma suit was dismissed.

On September 21, 1961, in the Mississippi federal court, Koehring moved to dismiss for lack of jurisdiction or, in the alternative, for change of venue to the United States District Court for the Northern District of Oklahoma. On September 27, 1961, Hyde brought suit in the Chancery Court, Hinds County, Mississippi, against Koehring on the identical cause of action asserted in the Mississippi federal suit. Koehring did not seek to remove this action to the federal court. On June 15, 1962, the Mississippi federal court denied Koehring's motions to dismiss and for change of venue. These rulings were certified for an interlocutory appeal under 28 U. S. C. § 1292(b).

The United States Court of Appeals for the Fifth Circuit, on September 19, 1963, held that the case should be transferred to the Northern District of Oklahoma and remanded it to the Mississippi federal court for that purpose. See Koehring Company v. Hyde Construction Company, 5 Cir., 324 F. 2d 295. Hyde filed a petition for rehearing which was denied on February 5, 1964,

and Koehring presented a motion to stay the proceedings in the state court which was denied on January 27.

On February 16, 1964, Hyde filed in the Mississippi federal court a motion to deny the transfer on the ground of changed circumstances. Hyde also gave notice that, in the event the foregoing motion was denied, it voluntarily dismissed the federal case under Rule 41(a)(1), F.R.Civ.P. Koehring's lawyers mailed to Hyde's lawyers an answer in the federal case on February 20, 1964. Apparently, this was also mailed to the Oklahoma federal court. It was actually not filed until March 11, 1964. On February 24, the Mississippi federal court overruled Hyde's motion to reconsider venue and entered an order for dismissal without prejudice.

The state court trial was set for March 9, 1964. On March 6, 1964, Koehring obtained from the Court of Appeals for the Fifth Circuit a temporary restraining order prohibiting Hyde from further action in the state court pending determination of an application for mandamus filed by Koehring on March 4. The state court then rescheduled the trial to begin at two o'clock on March 10. On that day the Court of Appeals for the Fifth Circuit in an unpublished opinion vacated the Mississippi federal court's order to dismiss the action and ordered a self-executing instanter transfer to the Northern District of Oklahoma. It also vacated its temporary ex parte restraining order. Meanwhile, the state court trial had been reset for March 11, 1964, at two o'clock P.M. On March 10, Koehring presented to the state court a motion to abate and stay the state proceedings pending the outcome of the trial in federal court. On the same day, the state court entered an order to proceed with the trial.

On the morning of March 11, Koehring presented to the Oklahoma federal court a certified copy of the order for instanter transfer and a motion for an injunction and for an ex parte restraining order. A temporary restraining order was issued before two o'clock P.M. ordering Hyde and its attorneys not to proceed with the state court trial. Telegraphic notice of this order was given to Hyde's attorneys, and the state court, before which the trial was proceeding, was told of the order. The trial continued and culminated on April 7, 1964, in a judgment in favor of Hyde and against Koehring in the amount of $464,450.08.

On March 14, the Oklahoma federal court issued an order for the arrest of Vardaman Dunn, an attorney for Hyde, on charges of criminal contempt because of his disobedience of the restraining order. On the same day, the Mississippi state court made an order restraining the United States Marshal from arresting Dunn. Dunn was taken into custody on March 16 and was released on a writ of habeas corpus issued by the United States District Court for the Southern District of Mississippi. On April 8, that court ordered the release of Dunn on the ground that the March 11 temporary restraining order of the Oklahoma federal court was invalid. See Dunn v. Stewart, D.C.S.D. Miss., 235 F.Supp. 955. This decision was reversed by the Court of Appeals for the Fifth Circuit on the ground that the invalidity of the restraining order could not be used to sustain the petition for habeas corpus. See Stewart v. Dunn, 5 Cir., 363 F.2d 591. On April 21, the Mississippi state court enjoined Koehring and its attorneys from proceeding with the case in the Oklahoma federal court.

On September 1, 1964, the Oklahoma federal court issued an order enjoining Hyde from collecting the Mississippi judgment but permitting Hyde to participate in

the appeal to the Mississippi Supreme Court. It also required Hyde and Dunn to reimburse Koehring in the sum of $9,009.08 for damages resulting from the civil contempt committed in violating the March 11 restraining order. Hyde appealed this order to the Court of Appeals for the Tenth Circuit which held that the injunction and contempt proceedings were invalid because the order of instanter transfer was invalid and the Oklahoma federal court had acted before the transfer to it of jurisdiction over the parties and the subject matter. See Hyde Construction Company v. Koehring Company, 10 Cir., 348 F.2d 643. This decision of the Tenth Circuit was reversed by the United States Supreme Court on January 17, 1966, which held that the Oklahoma federal court had jurisdiction under the instanter transfer. See Koehring Company v. Hyde Construction Company, 382 U.S. 362, rehearing denied 383 U.S. 939.

On October 4, 1965, the Supreme Court of Mississippi denied the appeal of Koehring, held that the Chancery Court had jurisdiction, and reduced the judgment by about $50,000. See Koehring Company v. Hyde Construction Company, (Miss.), 178 So.2d 838 and 182 So.2d 580. Koehring did not seek review by the United States Supreme Court of this decision. The Mississippi Supreme Court also held that the order of the Chancery Court enjoining Koehring from proceedings in the Oklahoma federal court was invalid. See Koehring Company v. Hyde Construction Company, (Miss.), 178 So. 2d 857.

On March 21, 1966, Hyde filed a motion in the Oklahoma federal court to dissolve the injunction, to vacate the civil contempt order, and to dismiss the case. It asserted, among other things, that the Mississippi judgment was final and barred further proceedings in the

Oklahoma federal court under the principle of res judicata. These motions were denied April 18, 1966. Hyde then appealed to the Court of Appeals for the Tenth Circuit from the denial of the motion to dissolve. This is the case now before us. Koehring moved for the dismissal of the appeal and we denied the motion on July 27, 1966, by an unpublished opinion. Koehring sought review by certiorari which the Supreme Court denied on November 14, 1966. See Koehring Company v. Hyde Construction Company, 385 U.S. 949.

After a hearing without a jury, the Oklahoma federal court, on August 23, 1966, found Dunn guilty of criminal contempt because of his violation of the March 11, 1964, restraining order and imposed a 90-day sentence. The appeal of Dunn, our case No. 9142, is disposed of by an opinion filed contemporaneously with the opinion in this case.

We have jurisdiction of appeals from interlocutory orders of district courts refusing to dissolve or modify injunctions. See 28 U. S. C. § 1292(a)(1). This appeal is from an order of the district court refusing to dissolve or modify its September 1, 1964, injunction barring Hyde from collecting or enforcing the Mississippi judgment and requiring Hyde to pay damages for the civil contempt which it committed in breaching the March 11, 1964, restraining order.

We have difficulty with the September 1 orders of the district court. The court recognized the pending appeal in the Mississippi Supreme Court and permitted Hyde to participate therein. At the same time it enjoined Hyde from enforcing the state judgment. It said that the federal trial would proceed as if the Mississippi state case had not been tried and then added that it might

take the state judgment into consideration when disposing of the federal case. These actions seem inconsistent to us. The effect is to permit two trials of the same issue — one in state court and one in federal court. Ordinarily, one trial of a controversy is enough.

Koehring argues that the issues raised by the motion to dissolve the injunction were finally and completely determined by the decision of the Supreme Court in Koehring Company v. Hyde Construction Company, 382 U.S. 362. That case in the court of appeals presented questions as to the jurisdiction of the Oklahoma federal court and as to the validity of the injunction. The court of appeals held that the Fifth Circuit's order of instanter transfer was invalid and did not reach the other issues. The Supreme Court granted certiorari and reversed summarily. In so doing it summarized the action of the district court and recited the provision of the order that "the civil suit between the parties [be] retried — this time in Oklahoma and in federal court." The Court concluded that, in the special circumstances of the case, the Oklahoma federal court acquired jurisdiction on March 11 under the Fifth Circuit's instanter transfer and that "the Tenth Circuit erred in vacating the District Court's orders on the stated jurisdictional ground." The Court remanded the case to the Oklahoma federal court "for further proceedings consistent with this opinion, reserving to the parties the right to apply to that court to have the case transferred back to the Southern District of Mississippi because of changed conditions."

Koehring argues that the decision of the Supreme Court means that the federal injunction against the state trial was valid. We do not read the opinion of the Supreme Court to intend such effect. The validity of the injunction is not discussed in spite of the fact that it was

attacked on grounds which raise serious questions bearing on the relationship of federal and state courts. The use in the opinion of the word "retried" has no significance to us because it appears in a recital of the provisions of the order of the Oklahoma federal court. The remand is for further proceedings consistent with the opinion but the opinion does no more than sustain the transfer jurisdiction. The remand recognizes the right of the parties to seek a transfer back to the federal court in Mississippi. This is not consistent with any idea that the Supreme Court intended to order a trial on the merits in Oklahoma federal court.

Hyde filed in the Supreme Court a "Petition for Rehearing And Motion To Amend Order of Remand." Therein it pointed out that the court of appeals, because of its ruling on the jurisdictional point, had declined to consider the other issues presented by Hyde. Such questions included the effect of the voluntary dismissal under Rule 41(a)(1) and the validity of the restraining order and injunction under 28 U.S.C. § 2283. Hyde asked that the case be remanded to the court of appeals for the determination of these questions. The Supreme Court denied the petition for rehearing and the motion to amend the order of remand. See Koehring Company v. Hyde Construction Company, 383 U.S. 939. Koehring interprets this denial as decisive of the points raised. We see the situation differently. In the exercise of its discretionary powers, the Supreme Court chose to confine its decision to the narrow jurisdictional point and in so doing did not express an opinion on the merits of the injunction. This failure to express an opinion does not amount to a determination that the points raised were decided adversely to Hyde. The points are substantial — not frivolous. One relates to the effect of a condi-

tional dismissal under Rule 41 (a) (1) — a point on which no appellate authority appears to exist. The other relates to the propriety of the injunction under one of the exceptions to 28 U.S.C. § 2283. It seems improbable to us that the Court would dispose of the merits of a case in this sensitive area without full-fledged presentation and without discussion of pertinent decisions.[1]

Koehring also argues that the remand to the district court rather than to the court of appeals shows that the Supreme Court intended that the validity of the injunction was settled. We find no such intent. Although the remand could have been to the court of appeals for consideration of the questions other than jurisdiction, the fact that such remand was not made does not mean that those other issues were decided. In our opinion the Supreme Court did not foreclose Hyde from the assertion of the issues now raised.

Koehring next urges that on the return of the case to the district court Hyde may urge only new and unforeseen circumstances in a motion to dissolve the injunction.[2] This argument assumes that the points raised by Hyde have been foreclosed. We reject the assumption. Hyde is entitled to have its contentions heard in an appellate court. Additionally, there is a changed circumstance. The Mississippi state court in personam judgment has been sustained, with a reduction in damages, by the state supreme court after full submission and consideration of jurisdictional questions; and the judgment has become

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[1]E.g. Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456, 466, and Kline v. Burke Construction Company, 260 U.S. 226, 232-233.

[2]See System Federation v. Wright, 364 U.S. 642, 647, (modification of a consent decree because of change in law), and United States v. Swift & Co., 286 U.S. 106, 114, (claim of changed facts).

final because of the failure of Koehring to seek certiorari review.

These conclusions make necessary consideration of the attack by Hyde on the injunction. Hyde says that the Mississippi federal court action was dismissed voluntarily under Rule 41(a)(1) before the transfer to the Oklahoma federal court. After the Court of Appeals for the Fifth Circuit ordered the district court to transfer the case to the Northern District of Oklahoma, Hyde filed in the Mississippi federal court a motion in three parts. Part A sought the revocation of the transfer order because of changed circumstances. Part B was a notice of dismissal under Rule 41(a)(1). Part C said that if Hyde was mistaken under Parts A and B, then it requested a dismissal by the court. The court declined to revoke the transfer as requested under Part A, held that the notice of dismissal was good, and dismissed the action.

Rule 41(a)(1) provides for a dismissal without order of the court "by filing a notice of dismissal at any time before service by the adverse party of an answer * * *." Hyde said, in effect, to the Mississippi federal court that if the case was not kept there, the case was dismissed. Such a conditional notice of dismissal is not within the scope of Rule 41(a)(1). The purpose of that rule is to provide a means for terminating an action automatically by filing with the clerk a notice of dismissal. That notice closes the file; no order of the court is needed.[3] If the conditioning of notices of dismissal is allowed, the clerk of the court will be called upon to exercise a duty more than merely ministerial. Instead of simply closing the file of a case once the notice of dismissal is filed, the clerk will have to construe the condition and perhaps even become a fact-

[3]American Cyanamid Co. v. McGhee, 5 Cir., 317 F. 2d 295, 297.

finder to determine when the condition is satisfied. This defeats the purpose of Rule 41(a)(1) to provide a quick, automatic means of ending an action.

In the instant case, Koehring had served an answer on Hyde before the condition was met. Rule 41(a)(1) is effective only until an answer is served by an adverse party. Hyde argues that a party cannot avoid the effect of a notice of dismissal without prejudice by answering after he has been notified that plaintiff intends to file a notice of dismissal. The cases cited for this point hold only that a defendant may not defeat Rule 41(a)(1) in removal cases by winning the race to the courthouse to file an answer immediately after the removal transcript is filed, or by serving an answer if he has notice that the plaintiff wishes to dismiss as soon as the transcript is filed. That is a far cry from saying that the plaintiff may prevent the defendant from answering for so long as the plaintiff is seeking determination of preliminary procedural issues.

The fact that the court, rather than the clerk, made the order of dismissal does not change the situation. The court acted on the basis that the notice under Rule 41(a)(1) was valid. The Court of Appeals held directly to the contrary and said "the District Judge is hereby ordered to vacate the order or orders of dismissal entered on February 24, 1964 * * *."[4]

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[4]In an unpublished opinion appearing in the record in this case, the Fifth Circuit said: "* * * the District Judge was of the opinion that, entirely consistent with our mandate, there being no answer yet filed, the Plaintiff Hyde had the unqualified right of dismissal or notice under F.R.Civ.P. 41(a)(1). On the oral presentation Tuesday, March 10, 1964, this Court was informed that subsequent to the Plaintiff's alternative motions (Parts A and B) filed on February 15, 1964, the Defendant Koehring Company served its answer on counsel for Hyde, F.R.Civ.P. 5(a)(b), the formal filing thereof under Subparagraph (d) not having been physically accomplished pending entry of an order by the District

So far as we are concerned this action by the Fifth Circuit is the law of the case. We believe that it is correct and we accept it. In our opinion the attempted dismissal did not oust either the Mississippi federal court or the Oklahoma federal court of jurisdiction.

The controlling argument on the validity of the injunction goes to the question of whether it is within one of the exceptions recognized in 28 U.S.C. § 2283. That statute forbids a federal court to enjoin state court proceedings except when expressly authorized by Congress "or where necessary in aid of jurisdiction, or to protect or effectuate its judgments." Koehring says that the injunction is necessary to protect the federal jurisdiction.

The rule is well established that a federal court may restrain proceedings in a state court when necessary to protect the federal court's jurisdiction over a res which is the subject of both the federal and state proceedings.[5] The rule is equally well established that if both federal and state actions are in personam, the actions may proceed simultaneously and the federal court may not enjoin the

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Court transferring the case to Oklahoma. There being no substantial dispute about this fact, we are of the clear view that the plaintiff did not have the unqualified right to dismissal under F.R.Civ.P. 41(a)(1) and in view of our mandate, the District Court did not have the power or right to entertain a motion on terms or conditions. The Plaintiff's motion (Part B) did not have the effect of a 'filing [of] a notice of dismissal' as of the date it was filed since it was not then a notice of dismissal, but was conditioned on adverse determination of Part A of its motion."

[5]See Donovan v. City of Dallas, 377 U.S. 408, 412; Toucey v. New York Life Insurance Co., 314 U.S. 118, 135; Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 195; and Denver-Greeley Valley Water Users Association v. McNeil, 10 Cir., 131 F. 2d 67, 70.

state proceeding.[6] The question, then, is whether we are dealing with cases in rem.

Both the federal and state actions seek damages for breach of contract. As such they are actions in personam. The claim of a res arises from the chancery attachment in each case of a creditor of Koehring as permitted by Mississippi law.[7] Under Mississippi law service on the attachment defendant "does not bring any fund into the possession, custody or control of the Court, no monies are paid into the registry of the Court, and no bond is required."[8] The only res is the debt owed Koehring in Mississippi. This was attached by Hyde as an aid to jurisdiction in both the federal and state courts. Koehring, for obvious reasons, does not now contest federal jurisdiction. Instead, it relies on the attached res to justify the injunction under the "in aid of its jurisdiction" exception in § 2283. Parenthetically, we observed that in the circumstances no such aid is required to sustain federal jurisdiction.

Once jurisdiction is obtained, the only function of the attached res is to afford a means of collecting whatever judgment might be secured. The courts have gone far in permitting simultaneous actions affecting a single res so long as the action taken on the res by one court will not

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[6]Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 195; Kline v. Burke Construction Co., 260 U.S. 226, 230; Skelly Oil Co. v. Phillips Petroleum Co., 10 Cir., 174 F. 2d 89, 100, modified in nonpertinent part, 339 U.S. 667; and Guardian Life Insurance Co. v. Kortz, 10 Cir., 151 F. 2d 582, 585.

[7]See Mississippi Code Annotated (1956) § 2729.

[8]Koehring Company v. Hyde Construction Company, (Miss.), 178 So. 2d 838, 848, quoting Dunn v. Stewart, D.C.S.D. Miss., 235 F. Supp. 955, 966.

conflict with actions by the other court.[9] Here the basis of each suit is an in personam claim for breach of contract. The attachment is an ancillary proceeding to aid in the collection of whatever judgment might be secured; it has nothing to do with the merits of either case. We have no question here of the enforcement of the state court judgment against the attached res. That judgment specifically dismissed the attachment defendant and does not affect any res within the control of the federal court. The Oklahoma federal court injunction goes beyond the protection of the res and restrains the state in personam proceedings. It is an unnecessary interference with a state court proceeding by the federal court, the very thing that § 2283 and the long-established rules of comity were designed to prevent. This conflict could easily have been prevented by enjoining only that part of the state court proceedings which affected the federal court's control of the attachment debtors.[10] The order of the court below restraining the entire state action was not necessary and cannot be sustained.

The situation is not changed by the fact that in both the federal and state proceedings Hyde sought, in addition to damages for breach of contract, a declaratory

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[9]See United States v. Klein, 303 U.S. 276; General Baking Co. v. Harr, 300 U.S. 433; and Denver-Greeley Valley Water Users Association v. McNeil, 10 Cir., 131 F. 2d 67.

[10]In Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 198, the Supreme Court said: "While it is often said that of two courts having concurrent jurisdiction *in rem*, that one first taking possession acquires exclusive jurisdiction, * * * it is exclusive only so far as its exercise is necessary for the appropriate control and disposition of the property. The jurisdiction does not extend beyond the purpose for which it is allowed, to enable the court to exercise it appropriately and to avoid unseemly conflicts. * * * The other court does not thereby lose its power to make orders which do not conflict with the authority of the court having jurisdiction over the control and disposition of the property."

judgment and injunctive relief. The declaratory judgment provisions[11] create no statutory exception to § 2283. The decision in American Ins. Co. v. Lester, 4 Cir., 214 F.2d 578, is distinguishable. The primary scope of that case was to declare rights of a number of parties and avoid a multiplicity of lawsuits. Equitable considerations required the protection of federal jurisdiction. Here the primary aim is the determination of damages for breach of contract; and no equitable considerations require an injunction against the state proceedings. In our opinion the right to a federal injunction does not flow from the fact that the actions seek damages for breach of contract, a declaratory judgment, and an injunction.[12] Koehring makes no claim that the state proceedings were conducted, or the state judgment obtained, fraudulently or unconscionably. We conclude that the injunction was not within the § 2283 exception permitting a stay in aid of federal jurisdiction.

Koehring argues further that the stay was permissible to protect or effectuate the federal judgment of the Fifth Circuit ordering the transfer to the Northern District of Oklahoma. We have held that the protection-of-judgments exception in § 2283 was included within the 1948 revision of the Judicial Code to overcome the effect of the decision in Toucey v. New York Life Insurance Co., 314 U.S. 118, and "to give Federal Courts the power to enjoin the relitigation of cases and controversies which have been fully adjudicated in such courts."[13] It may be that in some situations the exception extends to interlocu-

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[11]28 U.S.C. §§ 2201 and 2202, and Rule 57, F.R.Civ.P.

[12]See IA, Moore Federal Practice ¶ 0.220, p. 2604.

[13]Jackson v. Carter Oil Co., 10 Cir., 179 F. 2d 524, 526-527, cert. denied 340 U.S. 812.

tory orders[14] but we have no reason here to recognize any such exception. The Fifth Circuit decided only where the federal case should be tried under the federal *forum non conveniens* law. The restraining order against proceeding in the Mississippi state court was expressly vacated by the Fifth Circuit. The Mississippi proceedings in no way conflict with the decision that the Northern District of Oklahoma is the more convenient federal forum. Our conclusion is that the Oklahoma federal injunction is not within any of the exceptions found in § 2283 and consequently is forbidden by that statute.

The basic thrust of Koehring's argument is that, regardless of whether the Oklahoma federal injunction was good or bad, it was issued and destroyed the efficacy of the state proceedings and state judgment for all purposes so far as the federal courts are concerned. No decisions of which we are aware support this novel concept. The in personam features of the controversy were thoroughly litigated in the state courts with full participation by Koehring. It voluntarily filed a general appearance in state court. It appealed the adverse judgment to the state supreme court and in that appeal litigated the right of the state court to proceed in the face of the injunction. The state supreme court carefully considered the issue and came to the conclusion that the state court had jurisdiction to proceed.[15] Koehring did not seek review of that decision in the Supreme Court of the United States; and the decision has become final. We have identity of parties — Koehring and Hyde — and identity of subject matter — jurisdiction of the Mississippi court to proceed. The

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[14]See Sperry Rand Corporation v. Rothlein, 2 Cir., 288 F. 2d 245, 249.

[15]See Koehring Company v. Hyde Construction Company, (Miss.), 178 So. 2d 838, 842-850.

principles of res judicata apply to questions of jurisdiction.[16]

Koehring seeks to carve out a new exception to the res judicata rule on the basis that the Mississippi proceedings in violation of the Oklahoma federal court order are contrary to the doctrine of federal sovereignty. We grant that the question of the validity of the plea of res judicata on the jurisdictional question now presented is for decision by the federal court.[17] We hold that, in the circumstances of this case, the plea is good. Such conclusion is the surrender of no federal authority. Federal law has long tolerated duplicating or overlapping proceedings in federal and state courts.[18] The dignity of the federal courts is adequately protected by the criminal contempt proceeding with which we are not concerned in this case. A holding that a state court is ousted of jurisdiction by an invalid order of a federal court would open a Pandora's box to resourceful litigants.

The March 11, 1964, temporary restraining order ended by its own time limitations and was followed by the September 1, 1964, injunction. Koehring says that Hyde should have appealed from the restraining order, and having failed to do so, may not question the adjudication of civil contempt. When this case was here before we held that the contempt order was so related to the injunction that both could be considered on a § 1292(a)(1) appeal.[19] We believe that the same conclusion is justified on this appeal. In United States v. United Mine Workers

[16]American Surety Co. v. Baldwin, 287 U.S. 156, 166.

[17]See Donovan v. City of Dallas, 377 U.S. 408, 412.

[18]Hart and Wechsler, The Federal Courts and The Federal System, 1057.

[19]Hyde Construction Co. v. Koehring Co., 10 Cir., 348 F. 2d 643, 647, reversed on other grounds 382 U.S. 362.

of America, 330 U.S. 258, 294-295, no appeal was taken from a temporary restraining order and the court said that there could be no sanctions in civil contempt for violation of an erroneous order. The March 11 order was in effect for only ten days. The general rule is that such orders are not appealable under § 1292(a)(1).[20] The failure to appeal from the temporary order does not foreclose consideration of the validity of that order on this appeal from the injunction and civil contempt judgment which were later entered.

To hold otherwise would permit a private litigant to take advantage of an error which it provoked in the first instance. The law affords a remedy for a right violated but does not grant relief to the perpetrator of a wrong.[21] A prosecution for criminal contempt vindicates the authority of a court regardless of whether it was properly exercised. Civil contempts provide a remedy for a party who has been injured by the violation of a court order. The right to such remedy "falls with an injunction which events prove was erroneously issued."[22] Accordingly, the adjudication for civil contempt and the penalty imposed therefor cannot stand.

Hyde urges us to order the dismissal of the case on the ground of res judicata. We decline to do so. The case is here on the sole issue of the propriety of the denial of the motion to dissolve the injunction. Our decision on res judicata is limited to the application of that principle to

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[20]See Pan American World Airways, Inc., v. Flight Engineers' International Association, 2 Cir., 306 F. 2d 840, 841-842, and Pennsylvania Motor Truck Association v. Port of Philadelphia Marine Terminal Association, 3 Cir., 276 F. 2d 931.

[21]Salvage Process Corporation v. Acme Tank Cleaning Process Corporation, 2 Cir., 86 F. 2d 727.

[22]United States v. United Mine Workers of America, 330 U.S. 258, 295.

the question of the jurisdiction of the Mississippi courts to proceed with the state trial. The merits are not before us. The plea of the application of the bar of res judicata to the merits, and all other questions pertaining to the merits of the controversy, must be decided by the district court in the first instance.

The injunction is dissolved. The judgment for civil contempt is vacated. The case is remanded to the district court for further proceedings consistent with this opinion.

APPENDIX D

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NO. 9142 — JANUARY TERM — 1968

VARDAMAN S. DUNN, Appellant, v. UNITED STATES OF AMERICA, Appellee.	Appeal from the United States District Court for the Northern District of Oklahoma

Before BREITENSTEIN, HILL and SETH, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This is a companion case to Hyde Construction Company v. Koehring Company, No. 8717, decided this day. Reference is made to the factual background there described.

Appellant Dunn was found guilty of criminal contempt because of the violation of a March 11, 1964, temporary restraining order entered by the United States District Court for the Northern District of Oklahoma. That order forbade Hyde Construction Company, its attorneys and agents, from proceeding with a state action pending in the Chancery Court of Mississippi. We have held in case No. 8717 that such order was invalid under 28 U.S.C. § 2283. Dunn contends that the federal court did not have jurisdiction because the case had been volun-

tarily dismissed under Rule 41(a)(1), F.R.Civ.P. We have held to the contrary.

Dunn says that he had no free choice because the Mississippi court had ordered him to proceed with the trial before it. The record does not sustain the contention.[1] Dunn further argues that his duty to his client required him to proceed with the Mississippi trial. Devotion to a client is no excuse for the violation of a court order.

Our decision that the restraining order was invalid because forbidden by 28 U.S.C. § 2283 does not destroy the criminal contempt conviction. When a court has juris-

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[1]The following occurred in the Mississippi state court after the parties had been notified of the Oklahoma federal court restraining order.

By Mr. Dunn. * * * We are in this Court. We are under the jurisdiction of this Court. We have our witnesses here. We have our records here. We have already commenced the trial of this case, and I concede it that under the order of this Court we shall proceed, and therefore I am ready to proceed.

By the Court: And is it your desire to proceed?

By Mr. Dunn: Yes, sir.

* * *

By the Court: * * * The Court is not forcing the issue. Of course, if you gentlemen want to recess we probably can recess this trial to March 23rd.

* * *

By Mr. Landrum (counsel for Koehring): Judge, I would like to make our position clear with respect to the announcement made by the Court, and that is that counsel for the defense are perfectly willing for this case to be deferred until March 23, and request that it so be deferred.

By the Court: I think in order for an agreement to be entered it would be necessary for counsel for both sides to agree to it.

By Mr. Dunn: Your Honor, I state again that I am in this Court and prepared for trial. I am here to try the case at great inconvenience and expense, and I am here under the order of this Court that this case is to be tried commencing at 2:00 P.M. today, and I have every intention of carrying out the order of this Court.

By the Court: All right, we will be back in the morning at 9:30."

The foregoing is taken from the record before us in No. 8717.

diction of the subject matter and person, its orders must be obeyed until reversed for error by orderly review.[2] The district court had the requisite jurisdiction. Although it may be that Dunn did not have an opportunity to appeal the restraining order which had a life of only ten days,[3] he should have obeyed it for that short period. The Supreme Court has said that: "Violations of an order are punishable as criminal contempt even though the order is set aside on appeal, * * *"[4]

Our greatest difficulty is that the district court acted on the assumption that its order was valid. We have held to the contrary with the result that Dunn is subjected to punishment for disobedience of an invalid order. A somewhat comparable situation was before the Supreme Court of the United States in Donovan v. City of Dallas, 377 U.S. 408. In that case an attorney and others had been convicted of criminal contempt by a Texas state court for violation of an order which the Supreme Court held was invalid. The Supreme Court pointed out that the Texas state court acted on the assumption of validity of the order and said (Id. at 414):

> "Since we hold the order restraining petitioners from prosecuting their case in the federal courts was not valid, but was invalid, petitioners have been punished for disobeying an invalid order. Whether the Texas court would have punished petitioners for

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[2]Frank v. United States, 10 Cir., 384 F. 2d 276, citing Howat v. Kansas, 258 U.S. 181, 189, and United States v. United Mine Workers of America, 330 U.S. 258, 293.

[3]In Hyde Construction Company v. Koehring Company, opinion filed this date, we recognize that the general rule is that a temporary restraining order of this type is not appealable.

[4]United States v. United Mine Workers of America, 330 U.S. 258, 294. See also Salvage Process Corporation v. Acme Tank Cleaning Process Corporation, 2 Cir., 86 F. 2d 727.

contempt had it known that the restraining order petitioners violated was invalid, we do not know. However, since that question was neither considered nor decided by the Texas court, we leave it for consideration by that court on remand. We express no opinion on that question at this time."

We believe that the same result should be reached in the case at bar. Accordingly, the judgment is reversed, and the case is remanded to the district court for further proceedings consistent with this opinion.

APPENDIX E

OPINION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

July Term 1965

HYDE CONSTRUCTION COMPANY, INC., Appellant, vs. KOEHRING COMPANY, Appellee.	No. 7929
VARDAMAN S. DUNN, Appellant, vs. KOEHRING COMPANY, Appellee.	No. 7930

Appeals from the United States District Court
for the Northern District of Oklahoma

Before PICKETT, LEWIS and SETH, Circuit Judges.

LEWIS, Circuit Judge.

These appeals are taken from an order and decree[1] entered by the United States District Court for the Northern District of Oklahoma springing from a finding that appellants were in civil contempt for disregarding a temporary restraining order issued by the court. The restraining order had been directed to "Hyde Construction Company, Inc., its attorneys, agents, and all persons acting in concert therewith" and required them to cease and desist from proceeding with a civil action then pending in the Chancery Court of the First Judicial District of Hinds County, Mississippi. The appellant Dunn is a member of the bar of Mississippi and attorney for Hyde Construction Company. It is not disputed that appellants did disregard the court's order and, through the expedient of over-simplification, we state the present appellate issue to be a determination of the validity of the restraining order.

Appellant Hyde Construction Company was prime contractor on a construction project concerning the erec-

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[1]"Now on this 1st day of September, 1964, It Is Ordered, Adjudged and Decreed by the Court

1. The trial of this case in this Court shall be had and conducted as if said Cause No. 60,068 in the Chancery Court for the First Judicial District of Hinds County, Mississippi had not been tried and as if the judgment therein had not been rendered. Nevertheless, this Court may at any time consider the judgment in said Case No. 60,068 in making final disposition of the matters hereinafter set out and in rendition of its judgment herein.

2. Until the further order of this Court, the plaintiff, Hyde Construction Company, Inc., its officers, agents, servants, employees, assigns, attorneys, and/or any person or corporation acting in concert therewith, be and they hereby are enjoined and restrained from directly or indirectly enforcing or collecting or attempting to enforce or collect in any manner whatsoever any rights or claims under or by virtue of the decree entered under date of April 8, 1964, in said Cause No. 60,068, or any other decree, judgment, motion, action, process, execution, proceeding or order premised thereupon; but nevertheless the ones so re-

tion of the Keystone Dam Spillway in the State of Oklahoma. It contracted with appellee Koehring Company for the latter to design and install a concrete plant for Hyde's use in the project. A dispute between the parties arose in reference to the performance of this contract, and on August 30, 1961 Hyde filed suit against Koehring in the Federal District Court for the Southern District of Mississippi, praying for writs of chancery attachment, injunctive relief, a declaratory judgment, and a money judgment of $500,000 for breach of the contract. Koehring contested the jurisdiction of that court, and in the alternative moved for a transfer of venue to the Federal District Court for the Northern District of Oklahoma pursuant to 28 U.S.C. § 1404(a). Apparently unsure of the jurisdiction of the Mississippi federal court, Hyde on September 27, 1961 filed suit in the state chancery court on the same breach of contract action, obtaining jurisdiction by virtue of chancery attachments upon debt-

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[1](Continued)
strained may participate in and contest any appeal from said judgment taken by Koehring Company.

3. Subsequent to the issuance of the temporary restraining order herein, Koehring Company has incurred reasonable and necessary expense of $28,866.33 because of the acts of Hyde Construction Company, Inc. and Vardaman S. Dunn in violation of the temporary restraining order. Of this, $9,009.80 is the reasonable and necessary expense in connection with the institution and prosecution of the proceedings in this court concerning contempt, and $19,856.53 is the reasonable and necessary expense in connection with proceedings had in Mississippi arising out of the violation of this Court's temporary restraining order. It Is Therefore Ordered And Decreed by the Court that Hyde Construction Company, Inc. and Vardaman S. Dunn shall be jointly and severally liable for and shall pay to Koehring Company forthwith the said sum of $9,009.80. Whether or not they or either of them shall be required to pay any further sum or sums is reserved for decision until the trial of this case has been concluded in this Court or until the further order of this Court granted for any reason.

4. It Is Therefore Ordered And Decreed By The Court that judgment is hereby entered in the sum of $9,009.80 against Hyde Construction Company and Vardaman S. Dunn, jointly and severally, and in

ors of Koehring.[2] The suit was not actively prosecuted at that time pending the disposition of Koehring's contentions before the Mississippi federal court.

In July of 1962 the Mississippi federal court denied Koehring's motions for transfer but certified the ruling for interlocutory appeal under 28 U.S.C. §1292(b) to the United States Court of Appeals for the Fifth Circuit. On September 19, 1963 the Fifth Circuit reversed the federal district court on the venue question and remanded the case to the district court for transfer to the Oklahoma federal court under 28 U.S.C. §§1404(a) and 1406(a). Koehring Co. v. Hyde Construction Co., 324 F. 2 295. Hyde then petitioned the Fifth Circuit for rehearing, which stayed the order until that petition was denied on February 5, 1964. During this period the state court action was progressing toward trial, March 9, 1964 being set as a tentative date. On December 30, 1963, just prior to the Fifth Circuit decision on Hyde's petition for rehearing, Koehring petitioned that court to enjoin the state suit, which the Fifth Circuit on January 27, 1964 refused to do, without prejudice to Koehring's right to apply to the Oklahoma federal court for such relief.

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[1](Continued)

favor of Koehring Company to reimburse Koehring Company for expenses incurred in connection with the institution and prosecution of the civil contempt proceedings as hereinabove set forth.

5. Jurisdiction of this cause and of this proceeding is retained for all purposes, including the purpose of giving full effect to this order and the making of such further orders and decrees or taking such further action as may be necessary or appropriate."

[2]At the time these suits were commenced, Rule 4(e) Fed. R. Civ. P., had not yet been amended to permit the initiation of federal court actions through use of state attachment procedures. See Notes of Advisory Committee on Rules, 28 U.S.C.A., Rule 4, Fed. R. Civ. P. (Supp. 1964).

Hyde then filed in the Mississippi federal district court, on remand, a motion to consider changed circumstances and not transfer the case to Oklahoma; in the alternative, Hyde sought voluntary dismissal of that action in accordance with Rule 41(a)(1) of the Federal Rules of Civil Procedure. Up to this time Koehring had not yet filed an answer on the merits but did so on February 20 pending the decision. On February 24, 1964, the Mississippi federal district court denied Hyde's motion in reference to the transfer issue but granted the motion for voluntary dismissal without prejudice, reasoning that the case had not yet been transferred to Oklahoma and that Rule 41(a)(1) allowed dismissal upon plaintiff's motion at any time before the filing of an answer.

On March 6, 1964 Koehring obtained ex parte from the Fifth Circuit a temporary restraining order prohibiting Hyde from further action in the state court suit pending determination of a writ of mandamus which had been filed by Koehring in the Fifth Circuit on March 4, petitioning that court of appeals to direct the Mississippi federal court to vacate its decision dismissing the action. The mandamus application was heard on March 10, and on that same afternoon the Fifth Circuit rendered its decision in Koehring's favor, vacating the Mississippi federal court's decision dismissing the action[3] and ordering the Mississippi federal judge to transfer the action. The order further stated that:

> "The Clerk of the District Court shall physically transfer the papers without delay and pending the entry of the order of transfer by the District Judge and the physical filing of the record in Oklahoma,

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[3]Appellants urge us to redecide the question of Hyde's right to dismissal, contending that this court is not bound by the Fifth Circuit determination. We see no necessity for inquiry into such issue for it is only the fact of the decision that is pertinent to our present determination.

this order shall constitute a transfer to enable the parties to present the matter to the District Court of Oklahoma." (Emphasis supplied.)

The order was concluded by the Fifth Circuit's vacating its temporary restraining order against Hyde's proceeding in the state court action because "the issuance of this writ fully protects and effectuates the orders, judgments, and mandates of this Court." Meanwhile, trial in the state court action had been set for the next day, March 11, at 2:00 pm.

At 9:45 a.m. the next day, March 11, counsel for Koehring presented to the Oklahoma federal court a certified copy of the Fifth Circuit's order together with a motion for an injunction and a temporary restraining order forbidding further proceedings in the state court suit, which was to begin trial later that same day. Both Hyde and Koehring were represented by counsel before the Oklahoma court and argued the merits of the injunction and restraining order, and just before 2:00 p.m., when the Mississippi trial was to begin, the temporary restraining order was granted to preserve existing conditions pending a decision on the jurisdiction of the Oklahoma federal court and the propriety of Koehring's motion for an injunction.[4] The news of this order reached Hyde's attorneys in Mississippi, including appellant Dunn, that same afternoon but they declined to obey it and continued on with the trial of the suit[5] until its conclusion on about March 25, when Hyde was awarded a judgment of over $486,000.

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[4]Koehring's motion for a "preliminary" injunction staying Hyde from proceeding in Mississippi was ultimately denied on April 9, 1964 after a full hearing. Among the reasons given by the court for denying the injunction was that "the state court trial has now been completed and therefore much of the initial problem and urgency for Koehring is now moot."

[5]The Mississippi state court on March 12 ordered the state trial to proceed.

On March 12 Koehring petitioned the court below to cite Hyde and Dunn for contempt; the court issued an order to Hyde and its attorneys to show cause on March 14 why they should not be found in contempt. At the hearing Hyde's counsel appeared but briefly and Dunn did not appear at all, but the court nevertheless entered findings and held Hyde and Dunn in civil contempt[6] Thereafter, on September 1, 1964, the court entered the judgment noted (Note 1, supra) and from which this appeal is taken.[7]

At the outset we are faced with the question of our own jurisdiction to review the September 1 order. Normally, a judgment for civil contempt against a party is not reviewable on appeal from that judgment but only on appeal from a final judgment in the related action. Fox v. Capital Co., 299 U.S. 105; Duell v. Duell, D.C. Cir., 178 F$_2$ 683, 687; Taylor v. Bowles, 9 Cir., 152 F$_2$ 311. However, a judgment for civil contempt against a non-party, such as Dunn, can support an appeal without dependence upon the related action if the judgment of contempt is, itself, final. Bessette v. W. B. Conkey Co., 194 U.S. 324; In re Manufacturers Trading Corp., 6 Cir., 194 F$_2$ 948; Fenton v. Welling, 9 Cir. 139 F$_2$ 608; 6 Moore's Federal Practice, ¶ 54.17 at p. 154. And

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[6]Appellant Dunn was also found to be in criminal contempt and a warrant of arrest issued March 14. The Mississippi state court issued an order purporting to restrain any U.S. Marshal from making the arrest until the state trial, then in progress, was completed. The arrest was made on March 16 and Dunn was immediately released from restraint by writ of habeas corpus issued by the United States District Court for the Southern District of Mississippi. This action is now pending upon appeal as No. 22081 in the Fifth Circuit.

[7]The court's order is clear to the effect that the injunction preventing collection of the Mississippi judgment is wholly dependent upon the findings and conclusions relative to the contempt judgment and must stand or fall with it.

here the problem is compounded by the question of whether a final judgment of contempt has ever been entered since the district court reserved its decision as to whether appellants will be required to pay further sums. However, 28 U.S.C. §1292(a)(1) gives jurisdiction to courts of appeals on appeals from interlocutory orders of the district courts "granting * * * refusing or dissolving injunctions * * *," and in this case the district court enjoined appellants from enforcing the state court judgment. Since the injunction is inseparable from the contempt orders, whose validity in turn depends upon the jurisdiction of the lower court, this court may and will review the entire order of September 1, 1964. Cf. Stewart-Warner Corp. v. Westinghouse Electric Corp., 2 Cir., 325 F. 2 822, cert. denied, 376 U.S. 944.

As argued by the parties, this case presents a myriad of complex issues, particularly the jurisdiction of a district court to determine its own jurisdiction and the power of a federal court to enjoin a state court action under exceptions to 28 U.S.C. §2283.[8] Initially, Koehring claims that the contempt rulings were correct regardless of whether the district court had jurisdiction over the parties and over the subject matter under the doctrine that a court has jurisdiction to determine its own jurisdiction except in cases of "plain usurpation" clearly not here applicable. Since a court has such jurisdiction, it has power to punish for violations of orders entered pursuant to it. Therefore, argues Koehring, the contempt orders must be affirmed regardless of the court's ultimate jurisdiction over the case.

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[8]Section 2283.

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

This position of Koehring overlooks the fact that it was civil contempt for which Hyde and Dunn were cited. While a court has the power to punish for criminal contempt for actions that are an affront to its dignity, even if the violation was of an order that was incorrectly entered, civil contempt is remedial and accrues to the benefit of the opposing party who has no claim to reimbursement for offenses solely against the court. As the Court stated in United States v. United Mine Workers, 330 U.S. 258, 295, respecting civil contempt: "The right to remedial relief falls with an injunction which events prove was erroneously issued, * * * and *a fortiori* when the injunction or restraining order was beyond the jurisdiction of the court." And see Heasley v. United States, 8 Cir., 312 F$_2$ 641, 648-49; Cliett v. Hammonds, 5 Cir., 305 F$_2$ 565, 570. Thus, the correctness of the contempt orders is dependent upon the jurisdiction of the district court, and the contempt orders must fall if that court's actions were beyond its statutory power.

The only method by which the district court could have acquired jurisdiction below was by way of transfer of the action originally filed in the Mississippi federal court. And since the Mississippi court did not transfer the papers until March 16, subsequent to the entering of the subject restraining order, the court below did not obtain jurisdiction prior to March 16, under normal procedures, since the transfer of the papers, etc., to the transferee court is considered essential to that court's acquiring jurisdiction. See, *e.g.*, Drabnik v. Murphy, 2 Cir., 246 F$_2$ 408; Wright on Federal Courts, p. 143. The court below, therefore could obtain jurisdiction only if the Fifth Circuit's order, by itself, constituted a transfer, which that court clearly did intend it to be. But the transfer statutes, 28 U.S.C. §§ 1404 and 1406, both specify

that only the "district court" may transfer, and it is basic that the appellate jurisdiction of all inferior federal courts is wholly dependent upon statute. Carroll v. United States, 354 U.S. 394. Koehring, not disputing these general principles, nevertheless argues that the Fifth Circuit had the power to "constitute" its order a transfer by virtue of 28 U.S.C. § 1651, the "All-Writs" statute authorizing federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." It is not apparent which particular "writ"[9] was issued by that court nor that the order was necessary or appropriate in aid of its own jurisdiction or judgment. But it is clear that the Fifth Circuit was attempting to accomplish something it normally would be powerless to do, for a transfer must, according to statute, be made by the district court, *and* it is not effective until the papers have been transferred. The Supreme Court recently stated that "extraordinary writs are 'reserved for really extraordinary causes,' * * * and then only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" Platt v. Minnesota Mining & Manufacturing Co., 376 U.S. 240, 245. Section 1651 "does not contain a new grant of judicial power," United States *ex rel.* Wisconsin v. First Fed. Sav. & Loan Ass'n, 7 Cir., 248 F2

[9]The Fifth Circuit order was a writ of mandamus specifically directed to the district judge and clerk except as to that portion of the order which stated the order to be self-executing. The function of the district court in obeying a mandate of the Court of Appeals is, of course, ministerial. Bastian v. Erickson, 10 Cir., 114 F_2 338. The Mississippi district court did not *refuse* to obey the original mandate of transfer ordered by the court of appeals but affirmatively indicated his willingness to do so. His action in granting Hyde's motion to dismiss the case instead of effectuating the original mandate for transfer to Oklahoma was, as the Fifth Circuit specifically held, no more than error. The district court promptly obeyed the writ of mandamus.

804, 809; *cf. Huddleston v. Dwyer,* 10 Cir., 145 F. 311, 315. With all deference, we hold that the Fifth Circuit was powerless to "constitute" one of its orders a transfer and that the Oklahoma district court did not obtain jurisdiction by virtue of such order. It follows that the district court had no jurisdiction to issue its original restraining order nor to punish appellants for not complying with the order.

The injunction and the contempt judgments are vacated and the cases are remanded for proceedings consistent with this opinion. Other contentions made on these appeals are either not properly before this court or are found to be without merit.

[*United States Court of Appeals, Tenth Circuit*]

JUDGMENT

Seventh Day, July Term, Wednesday, July 21st, 1965

Before Honorable John C. Pickett, Honorable David T. Lewis and Honorable Oliver Seth, Circuit Judges.

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Oklahoma and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the injunction and the contempt judgments are vacated and the cases are remanded for proceedings consistent with the opinion of the court. Other contentions made on these appeals are either not properly before this court or are found to be without merit. It is further ordered that Hyde Construction Company, Inc., and Vardaman S. Dunn, appellants, have and recover of and from Koehring Company, appellee, their costs herein and have execution therefor.

APPENDIX F

SUPREME COURT OF THE UNITED STATES

KOEHRING CO. *v.* HYDE CONSTRUCTION CO., INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 593. Decided January 17, 1966.

PER CURIAM.

On March 11, 1964, pursuant to a transfer order issued by the Court of Appeals for the Fifth Circuit, the United States District Court for the Northern District of Oklahoma entered an order temporarily restraining respondents from proceeding with trial of a case in the Mississippi state courts. When respondents, in disregard of the temporary restraining order, proceeded to trial in Mississippi, the District Court on March 14 found them in civil contempt.[1] Undeterred, respondents pressed the state court action to a conclusion and obtained a judgment against petitioner on April 8. But the District Court, on September 1, enjoined respondents from seeking to enforce the Mississippi judgment, required them to compensate petitioner for reasonable expenses in connection with the contempt proceeding, reserved decision as to whether they must also reimburse petitioner for expenses relating to the Mississippi litigation, and ordered the civil suit between the parties retried — this time in Oklahoma and in federal court.

Respondents appealed from this decree to the Court of Appeals for the Tenth Circuit which reversed, holding

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[1] Criminal contempt charges were also filed, but are not involved in the present petition.

that at the time the District Court had entered the original restraining order it was without jurisdiction since it had not yet received the case file from the transferor court. We are asked to review that determination. We grant the petition and reverse.

The District Court had assumed jurisdiction of the cause and entered its restraining order on March 11, five days before the papers in the case were transferred to it from Mississippi. It acted upon the basis of a certified copy of an order entered the previous day by the Court of Appeals for the Fifth Circuit. That order provided not only that the District Court for the Southern District of Mississippi had erred in failing to comply with an earlier appellate mandate to transfer the case, but also that "pending the entry of the order of transfer by the District Judge and the physical filing of the record in Oklahoma, this order shall constitute a transfer to enable the parties to present the matter to the District Court of Oklahoma."

Although a federal appellate court does not ordinarily itself transfer a case to another district, but remands to the District Court for that purpose,[2] the extraordinary action in this case was taken as a result of extraordinary circumstances. These included the fact that the Federal District Court in Mississippi had granted a motion to dismiss despite instructions from the Fifth Circuit to transfer the cause to Oklahoma,[3] and the further fact

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[2]Cf. *Platt* v. *Minnesota Mining Co.*, 376 U. S. 240 (under Rule 21(b) of the Federal Rules of Criminal Procedure).

[3]The Fifth Circuit suggests that the District Court's action was the result of misunderstanding over whether an answer had been filed and hence of its duty to grant a voluntary dismissal under Rule 41(a)(1) of the Federal Rules of Civil Procedure, rather than the result of unreadiness to respect appellate instructions.

that a duplicative action in the Mississippi state courts brought be respondent Hyde Construction Company was to commence, and did in fact commence, on March 11—one day after the Fifth Circuit's *instanter* transfer and the very day on which the Federal District Court in Oklahoma entered its order.

In the special circumstances of this case, we conclude that the District Court in Oklahoma had acquired jurisdiction on March 11 in accordance with the Fifth Circuit's order for *instanter* transfer and that the Tenth Circuit erred in vacating the District Court's orders on the stated jurisdictional ground. We do not read 28 U. S. C. § 1404(a), providing that "a district court may transfer any civil action," as precluding an appellate court, where unusual circumstances indicate the necessity thereof, from effecting a transfer by direct order.[4]

Accordingly, we grant the petition, reverse the judgment, and remand to the District Court for the Northern District of Oklahoma for further proceedings consistent with this opinion, reserving to the parties the right to apply to that court to have the case transferred back to the Southern District of Mississippi because of changed conditions.[5]

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissenting.

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[4] *Drabik* v. *Murphy*, 246 F. 2d 408 (C. A. 2d Cir.), is not authority for the proposition that the transferee court fails to acquire jurisdiction until papers are received from the transferor court. On the contrary, *Drabik* suggests that the transferor court may lose jurisdiction before that event.

[5] This reservation was made in the opinion of the Fifth Circuit.

I think, as shown by the record and the carefully prepared opinions of the able judges in both the Fifth and the Tenth Circuits, that the circumstances of this case are both too complex and obscure, and the issues which concern among other things the relationship between state and federal courts and the transfer of cases between federal courts are all too important to be treated in the cursory manner the Court does here. This Court's reversal of the judgment below, without giving respondents any opportunity for oral argument to support the thoroughly considered opinion and holding of the Tenth Circuit, seems more extraordinary to me than what the Court's *per curiam* opinion refers to as the "extraordinary circumstances" in the courts below. I dissent from that course of action taken by this Court.

APPENDIX G

IN THE
SUPREME COURT OF THE UNITED STATES

KOEHRING COMPANY, *Petitioner,* vs. HYDE CONSTRUCTION COMPANY, INC., ET AL., *Respondents.*	No. 593

RESPONDENTS' PETITION FOR REHEARING AND MOTION TO AMEND ORDER OF REMAND

Respondents, Hyde Construction Company, Inc. and Vardaman S. Dunn, respectfully petition the Court for rehearing of the decision and judgment in this cause and move the Court to amend the order remanding the case to the District Court for the Northern District of Oklahoma, to the end that the case may be remanded to the Court of Appeals for the Tenth Circuit for completion by that Court of its appellate review processes in the light of this Court's decision and judgment, and for grounds state the following:

1.

The only issue decided by the Court of Appeals was the transfer-jurisdictional issue, and this single threshold issue was the sole issue involved in the question presented to and decided by this Court on the writ of certiorari.

2.

Several additional points were specified, briefed and argued in the Court of Appeals, presenting serious issues

vitally affecting or dispositive of the case under review. Such issues were not reached or decided by the Court of Appeals, but were pretermitted by that Court in view of its ruling on the threshold jurisdictional decision.

3.

The Court of Appeals has not completed its appellate function of reviewing the judgment of the District Court on the basis of the record and the points specified, briefed and argued before that Court, and the review process cannot be completed if the Court of Appeals is by-passed by remanding the case to the District Court, except upon a subsequent appeal attended by unnecessary expense and delay.

WHEREFORE, Respondents respectfully pray that they be afforded a re-hearing for the purpose of presenting the grounds outlined above, and Respondents respectfully move the Court to amend its order or mandate to the extent of directing that the cause be remanded to the Court of Appeals for the Tenth Circuit for further proceedings and appellate review in that Court, and in support hereof Respondents submit the sub-joined brief.

APPENDIX H

SUPREME COURT OF THE UNITED STATES

No. 593 — October Term, 1965

Koehring Company,

Petitioner,

v.

Hyde Construction Company, Inc., et al

The petition for rehearing and motion to amend order of remand are denied.

March 7, 1966

APPENDIX I

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19819

KOEHRING COMPANY, ET AL.,
Appellants,

versus

HYDE CONSTRUCTION COMPANY, INC.,
Appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

(September 19, 1963.)

Before CAMERON, BROWN, and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: This case concerns the transfer of a cause to another district, under 28 U.S.C.A. 1404(a).

Hyde Construction Company, a Mississippi company, brought suit in a federal district court in Mississippi against Koehring Company, a Wisconsin corporation, and C. S. Johnson Company, a division of Koehring. Hyde alleged that Koehring agreed to construct a concrete cooling and mixing plant at the job site of a spillway at Keystone Dam on the Arkansas River in Oklahoma, and that the plant, as built, did not meet

the minimum operational standards agreed on in the contract between the parties. Koehring moved to dismiss on the ground that the court lacked jurisdiction since it was not "doing business" in Mississippi within the meaning of that state's statutes. Alternatively, it asked the district judge to transfer the cause to the Northern District of Oklahoma, where the alleged breach of contract took place and where its own action against the plaintiff was then pending. The trial judge denied both motions.

We do not reach the jurisdictional question for we hold that the case should be transferred under 28 U.S.C.A. 1404(a) to the Northern District of Oklahoma.

I.

Section 1404(a), Title 28 U.S.C.A., states the criteria to be considered in a motion for change of venue:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

These criteria have been spelled out in *Gulf Oil Corp. v. Gilbert,* 1947, 330 U. S. 501, 67 S.Ct. 839, 91 L. Ed. 1055. In that case the Supreme Court said:

> "Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling and the cost of obtaining attendance of willing witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. . . ."

Advantage and convenience to the litigants themselves are not the only important considerations, however. The Supreme Court went on to point out that

> "factors of public interest also have place in applying the doctrine. Administrative difficulties follow for court when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not too be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, though, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws and in law foreign to itself."

Many of the elements mentioned in *Gulf Oil* as important are present here. The concrete cooling and mixing plant here in question was installed in Oklahoma; all relevant facts concerning its alleged failure to perform occurred in Oklahoma; if, in view of the complexity of its operation, an on-site inspection of the plant is necessary, it can be had only in Oklahoma. Most of the witnesses to the alleged failure of performance reside at or near the plant site, and the records of the U. S. Corps of Engineers dealing with the functioning of the plant are kept in Tulsa. Moreover, the docket in the Southern District of Mississippi is extremely congested, while that of the federal district court in the Northern District of Oklahoma is relatively current. Thus, every factor points to Oklahoma as the most logical forum for this action,

whereas the only connection which Mississippi has with this case is that one party to this suit resides there.

This case is similar to *Chicago, Rock Island & Pacific Railroad Co. v. Igoe,* 7 Cir. 1955, 220 F.2d 299. There the court pointed out that if "convenience of the parties" were the sole criterion, the refusal of the trial judge to transfer under Section 1404(a) could be sustained, since the plaintiff did in fact live in the district where suit was brought. There were, however, other statutory criteria to be considered. The Court stated:

> "As to the second test, 'convenience of witnesses,' it is self-evident that the convenience of both plaintiff's and defendant's witnesses would be served by a trial of the cause in the Southern District of Iowa. A number of witnesses reside at Avoca which is 459 miles from Chicago but only 33 miles from Council Bluffs and 104 miles from DesMoines, the two cities where the trial might be held. . . . There is nothing in this record to indicate the convenience of witnesses will be served by a trial in Chicago."

The Seventh Circuit then went on to discuss the "interest of justice," which it felt should be given paramount consideration: "In the interest of justice there should be considered the relative ease of access to sources of proofs; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; the possibility of a view of the premises; and the state of the court calendar both in the District where the case is pending, and in the District to which it is sought to have the case transferred." The Court concluded that in these circumstances it was warranted in ordering the cause transferred to the proper forum. The same factors obtain here, and we have reached the same conclusion.

II.

The Supreme Court in the recent case of *Goldlawr, Inc. v. Heiman,* 1962, 369 U.S. 463, 82 S.Ct. 913, 8 L. Ed. 2d 39 has held that a court may transfer an action under 28 U.S.C.A. 1406(a) even though it lacks jurisdiction over the person. That section provides:

> "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

Construing this statute, the Supreme Court stated:

> "The language of §1406(a) is amply broad enough to authorize the transfer of cases, however wrong the plaintiff may have been in filing his case as to venue, whether the court in which it was filed had personal jurisdiction over the defendant or not. The section is thus in accord with the general purpose which has prompted many of the procedural changes of the past few years — that of removing whatever obstacles may impede an expeditious and orderly adjudication of cases and controversies on their merits. When a lawsuit is filed, that filing shows a desire on the part of the plaintiff to begin his case and thereby toll whatever statutes of limitation would otherwise apply. The filing itself shows the proper diligence on the part of the plaintiff which such statutes of limitation were intended to insure. If by reason of the uncertainties of proper venue a mistake is made, Congress, by the enactment of §1406(a), recognized that 'the interest of justice' may require that the complaint not be dismissed but rather that it be transferred in order that the plaintiff not be penalized by what the late Judge Parker aptly characterized at 'time-consuming and justice-defeating technicalities.' It would be least

> partially frustrate this enlightened congressional objective to import ambiguities into § 1406(a) which do not exist in the language Congress used to achieve the procedural reform it desired."

The same considerations of convenience and procedural reform which prompted the enactment of Section 1406(a) apply to Section 1404(a), and there is no basis for distinguishing between them insofar as the rule enunciated in *Goldlawr* is concerned. See 1 Moore, Federal Practice para. o.146[5] at 1097 (2d Ed. 1951); 61 Mich. L. Rev. 393 (1962); 1963 Duke L. J. 168. Thus, whether or not the trial court below had personal jurisdiction over the defendant, for "the convenience of parties and witnesses" and "in the interest of justice" the cause should be transferred to Oklahoma.

The cause is REMANDED with instructions that it be transferred to the Northern District of Oklahoma.

APPENDIX J

[U. S. Court of Appeals, FILED, Mar. 6, 1964, Edward W. Wadsworth, Clerk]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 21333

KOEHRING COMPANY (including its Division C. S. JOHNSON COMPANY, — Petitioner

vs.

HYDE CONSTRUCTION COMPANY, INC.

and

HONORABLE S. C. MIZE, United States District Judge for the Southern District of Mississippi, — Respondents

NO. 19819

KOEHRING COMPANY, ET AL., — Appellants

vs.

HYDE CONSTRUCTION COMPANY, INC., — Appellee.

Before CAMERON, BROWN and WISDOM, Circuit Judges.

PER CURIAM:

This is an application for mandamus and other appropriate relief referred by the Court to this panel. The papers show without contradiction that in our opinion September 19, 1963, in No. 19819 and the mandate issued thereon, this Court ordered:

> "The cause is remanded with instructions that it be transferred to the Northern District of Oklahoma."

On February 5, 1964, Petition for Rehearing was denied. On January 27, 1964, the Appellant's motion for injunction was denied but "without prejudice to appellant's right to apply to the District Court to which the case was remanded [Northern District of Oklahoma] for transfer back." Nevertheless, Respondent District Judge, Southern District of Mississippi, on February 24, 1964, on application of the plaintiffs-appellees (Hyde) purported to dismiss the case without prejudice under F.R.Civ.P, 41(a)(1). With the case dismissed, the plaintiffs (Hyde) thereupon proposes to try the State Court suit beginning March 9, 1964. As this action of the District Court raises substantial questions whether further orders are necessary or appropriate in aid of the jurisdiction of this Court, 28 USCA §1651, or "necessary in aid of its jurisdiction, or to protect or effectuate its judgment, 28 USCA §2283, it is ORDERED that the parties show cause within ten days (see Rule 13(a) (b) (c) of this Court) why a writ of mandamus or other appropriate orders should not be issued and that pending determination of such matters, the parties are enjoined and restrained from proceeding with the case in the State Court.

Judge Cameron did not participate in this Order.

ENTER:

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By G. F. Garwihear
Deputy

New Orleans, Louisiana
Mar. 6, 1964

APPENDIX K

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 21333

KOEHRING COMPANY (including its Division C. S. JOHNSON COMPANY), Petitioner

vs.

HYDE CONSTRUCTION COMPANY, INC.

and

HONORABLE S. C. MIZE, United States District Judge for the Southern District of Mississippi, Respondents

NO. 19819

KOEHRING COMPANY, ET AL., Appellants

vs.

HYDE CONSTRUCTION COMPANY, INC., Appellee.

Before CAMERON, BROWN and WISDOM, Circuit Judges.

PER CURIAM:

Immediately after the issuance of this Court's order on Friday, March 6, 1964, Hyde Construction Company, Inc. requested opportunity to be heard immediately. Written response directed to that part of our order restraining the State Court proceeding was thereupon filed. This response and the oral presentation before a member of this panel covers all available arguments in support of the District Judge's order of dismissal and consequent absence of an order to transfer to Oklahoma. The District Judge has made full response in which he files formal assurances that the orders of this Court will be promptly executed. This response in brief shows that the

District Judge was of the opinion that, entirely consistent with our mandate, there being no answer yet filed, the Plaintiff Hyde had the unqualified right of dismissal or notice under F.R.Civ.P.41(a)(1). On the oral presentation Tuesday, March 10, 1964, this Court was informed that subsequent to the Plaintiff's alternative motions (Parts A and B) filed on February 15, 1964, the Defendant Koehring Company served its answer on counsel for Hyde, F.R.Civ.P. 5(a) (b), the formal filing thereof under Subparagraph (d) not having been physically accomplished pending entry of an order by the District Court transferring the case to Oklahoma. There being no substantial dispute about this fact, we are of the clear view that the Plaintiff did not have the unqualified right to dismissal under F.R.Civ.P. 41(a) (1) and in view of our mandate, the District Court did not have the power or right to entertain a motion on terms or conditions. The Plaintiff's motion (Part B) did not have the effect of a "filing [of] a notice of dismissal" as of the date it was filed since it was not then a notice of dismissal, but was conditioned on adverse determination of Part A of its motion.

The result is that the District Judge was in error in undertaking to permit dismissal and in declining to order immediate transfer of the cause to the Northern District of Oklahoma as required by our prior mandate and orders. In view of the District Judge's expressed willingness to carry out our orders, we would not ordinarily enter a writ of mandamus. But since phases of the case are pending for imminent trial in the State Courts of Mississippi, and Koehring is of the view that it has a substantial basis for obtaining injunctive relief from the United States District Court for the Northern District of Oklahoma, we think that for the protection of the rights of all concerned, this order should, and hereby does, constitute

the writ of mandamus. Accordingly, the District Judge is hereby ordered to vacate the order or orders of dismissal heretofore entered on February 24, 1964, and is further ordered to immediately transfer the cause to the District Court for the Northern District of Oklahoma. This Court having the power to construe its own orders and mandates also declares that the order of January 27, 1964, its original mandate and the order of February 5, 1964, denying the petition for rehearing all affirmatively recognize that either one, or both, or all of the parties shall have the right to apply to the District Court for the Northern District of Oklahoma to have the case transferred back to the Southern District of Mississippi because of alleged changed conditions. The Clerk of the District Court shall physically transfer the papers without delay and pending the entry of the order of transfer by the District Judge and the physical filing of the record in Oklahoma, this order shall constitute a transfer to enable the parties to present the matter to the District Court of Oklahoma.

The issuance of this writ fully protects and effectuates the orders, judgments, and mandates of this Court and the temporary restraining order heretofore issued is no longer necessary or appropriate in aid of its jurisdiction, and such injunction and restraining order is vacated.

Judge Cameron was not available to participate in this order.

ENTER:

I CERTIFY THIS IS A TRUE COPY

/s/ John R. Brown

JOHN R. BROWN
UNITED STATES CIRCUIT JUDGE
March 10, 1964